

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

JUL 10 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

GEORGE MENDOZA HERRERA,

Appellant.

)
)
) 2 CA-CR 2007-0238
) DEPARTMENT A
)

MEMORANDUM DECISION

)
) Not for Publication
) Rule 111, Rules of
) the Supreme Court
)
)

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20052537

Honorable Michael J. Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Jonathan Bass

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rose Weston

Tucson
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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant George Herrera was convicted of one count of theft of a means of transportation by controlling stolen property and one count of failure to stop. The trial court sentenced him to an enhanced, partially aggravated prison sentence of fifteen years for the theft offense and time served for the failure-to-stop offense. On appeal, Herrera claims the trial court erred when it refused to instruct the jury on a lesser included offense to the theft charge and on a definition of the term “stolen property.” Herrera also claims prosecutorial misconduct entitles him to a new trial. Finding no abuse of discretion and no error, we affirm.

Relevant Facts

¶2 We view the facts in the light most favorable to upholding the jury’s verdicts. *State v. Davolt*, 207 Ariz. 191, n.1, 84 P.3d 456, 464 n.1 (2004). Herrera was arrested after police officers observed him driving a truck that had been reported stolen. At the time of Herrera’s arrest, the truck’s steering column had been broken to expose the ignition rack; the bumpers, a tow hitch, and mirrors had been removed; and a window had been broken. The truck’s owner testified that none of this damage had happened before the truck was stolen. The state presented evidence that common indicators of a stolen vehicle include “cracked columns” and “broken windows.” The state’s evidence also explained how a car can be started without keys when the ignition rack has been exposed.

Refusal to Instruct on Lesser Included Offense

¶3 Herrera argues the trial court erred in refusing his request to instruct the jury on unlawful use of a means of transportation under A.R.S. § 13-1803 as a lesser included offense of theft of a means of transportation under A.R.S. § 13-1814. We review a court’s

denial of a requested jury instruction for an abuse of discretion. *State v. Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d 735, 741 (2006). When an instruction is requested by a party and supported by the evidence, a trial court must instruct the jurors on all offenses “necessarily included” in the offense charged. *State v. Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d 148, 150 (2006). For an offense to be necessarily included, it must be a lesser included offense *and* the evidence must be “such that a jury could reasonably find that only the elements of a lesser offense have been proved.” *Id.* “An offense is lesser included when the greater offense cannot be committed without necessarily committing the lesser offense.” *State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980).

¶4 Herrera was charged originally pursuant to § 13-1814(A)(1) and (5). Section 13-1814(A) provides:

A person commits theft of means of transportation if, without lawful authority, the person knowingly does one of the following:

1. Controls another person’s means of transportation with the intent to permanently deprive the person of the means of transportation.

. . . .

5. Controls another person’s means of transportation knowing or having reason to know that the property is stolen.

Section 13-1803(A) provides:

A person commits unlawful use of means of transportation if, without intent permanently to deprive, the person either:

1. Knowingly takes unauthorized control over another person’s means of transportation.

2. Knowingly is transported or physically located in a vehicle that the person knows or has reason to know is in the unlawful possession of another person

At trial, the state decided to proceed only under § 13-1814(A)(5) and argued that unlawful use is not a lesser included offense of theft of means of transportation under that subsection. Over Herrera's objection, the court instructed the jury only pursuant to subsection (A)(5) on the theft count and did not instruct on unlawful use. The court also denied Herrera's related motion for mistrial.¹

¶5 On appeal, Herrera relies on *State v. Kamai*, 184 Ariz. 620, 622, 911 P.2d 626, 628 (App. 1995), for the general proposition that unlawful use is a lesser included offense of auto theft. *Kamai* states that unlawful use under § 13-1803 is a lesser included offense of theft under A.R.S. § 13-1802(A)(1), which is worded similarly to § 13-1814(A)(1). *Kamai*, 184 Ariz. at 622, 911 P.2d at 628. These statutory subsections both include as an element an intent to deprive, a fact that is crucial to the analysis in *Kamai*. *Id.* Herrera's argument that unlawful use is a lesser included offense in this case is also grounded on the assertion that an intent to deprive is the distinguishing element of the greater offense. But § 13-1814(A)(5) does not require an intent to deprive. And because the jury was not instructed pursuant to § 13-1814(A)(1), the analysis in *Kamai* is inapplicable.

¶6 Herrera is required to provide argument supported by proper authorities or his argument is waived. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004);

¹On appeal, Herrera does not challenge the court's refusal to instruct on subsection (A)(1) of § 13-1814, nor does he challenge the denial of his motion for mistrial.

see also Ariz. R. Crim. P. 31.13(c)(1)(vi). He relies solely on an inapplicable case; provides no analysis of the offense of which he was actually convicted, § 13-1814(A)(5); and does not attempt to explain how unlawful use is a lesser included offense of theft of means of transportation under this subsection. He has therefore waived any argument on appeal.² *See Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d at 616.

Instruction Defining Stolen Property

¶7 Herrera also argues the trial court erred in refusing to give a jury instruction defining the term “stolen property.” We review a trial court’s decision to refuse a jury instruction for an abuse of discretion. *See Johnson*, 212 Ariz. 425, ¶ 15, 133 P.3d at 741. If the court errs when giving jury instructions, we review for harmless error. *State v. Johnson*, 205 Ariz. 413, ¶ 27, 72 P.3d 343, 351 (App. 2003). “Error is harmless if we can conclude beyond a reasonable doubt that it did not influence the verdict.” *State v. McKeon*, 201 Ariz. 571, ¶ 9, 38 P.3d 1236, 1238 (App. 2002).

¶8 Herrera requested an instruction that defined “stolen property” as “property that has been taken without lawful authority and with the intent to deprive the lawful owner of that property.” He asserts the definition was necessary for the jury to decide whether the element of “stolen” in § 13-1814(A)(5) had been met. But we conclude, beyond a reasonable doubt that, based on the uncontradicted evidence presented about the condition

²Because we conclude this issue is waived, we do not address the state’s argument that Herrera’s proposed instruction misstated the law. Further, we do not address Herrera’s undeveloped claim that the alleged error in refusing to give the instruction constituted a due process violation because it also is waived for failure to provide sufficient argument. *See Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d at 616.

of the truck, as summarized above, no rational jury could have found that Herrera did not know the truck was “stolen property,” even under Herrera’s proposed definition of that term. Therefore, we need not decide whether the trial court erred in refusing the requested instruction because we conclude that any such error was harmless. *See Johnson*, 205 Ariz. 413, ¶ 27, 72 P.3d at 351.

¶9 In his reply brief, Herrera responds to the state’s argument that his instruction misstated the law by arguing that, even if that is true, the trial court erred by failing to instruct the jury on the following definition provided in A.R.S. § 13-2301(B)(2): “‘Stolen property’ means property of another . . . that has been the subject of any unlawful taking.” But Herrera did not request such an instruction at trial and has therefore waived this issue absent fundamental error. *State v. Finch*, 202 Ariz. 410, ¶ 19, 46 P.3d 421, 426 (2002); *see also* Ariz. R. Crim. P. 21.3(c). He does not argue that the court’s failure to provide an instruction pursuant to § 13-2301(B)(2) sua sponte was fundamental error and has not carried his burden to show that fundamental, prejudicial error occurred. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

Prosecutorial Misconduct

¶10 Herrera last alleges prosecutorial misconduct occurred when the prosecutor cited a depublished case and a memorandum decision in support of her argument that unlawful use was not a lesser included offense of theft of a means of transportation. But Herrera does not provide any relevant legal authority on the issue of prosecutorial misconduct. He does not state the standard of review for examining such a claim, nor explain how the prosecutor’s actions in this case meet the test for establishing reversible

error. *See, e.g., State v. Morris*, 215 Ariz. 324, ¶¶ 46-47, 160 P.3d 203, 214 (2007), *cert. denied*, ___ U.S. ___, 128 S. Ct. 887 (2008). He has therefore waived this issue on appeal. *See Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d at 616 (failure to provide sufficient argument constitutes waiver of claim); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi).

¶11 Moreover, Herrera did not object to the alleged misconduct at trial, and we therefore would review only for fundamental error.³ *See Morris*, 215 Ariz. 324, ¶ 47, 160 P.3d at 214. Herrera does not allege fundamental error and has failed to carry his burden to show fundamental, prejudicial error occurred. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607.

Conclusion

¶12 Based on the foregoing, we affirm Herrera's convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

³On the second day of trial, Herrera informed the court that the case cited by the prosecutor the day before had been depublished. He renewed his request for a lesser included offense instruction, but did not object on grounds of prosecutorial misconduct.

J. WILLIAM BRAMMER, JR., Judge